IN THE

Supreme Court of the United States

October Term, 1971

FEB 9 1972
E. ROBERT SEAVER, CLERK

No. 71-1021

GROUP I—EMPLOYEES OF THE DEPARTMENT OF PUBLIC HEALTH & WELFARE, STATE OF MISSOURI

A. DIVISION OF MENTAL DISEASES:

1. STATE HOSPITAL NO. 1, FULTON, MISSOURI
Garfield Branch, Robert M. Miller, Melvin Trammell, Victor J. R. Weiser,

2. STATE HOSPITAL NO. 2, ST. JOSEPH, MISSOURI
Juanita Abberry, Myrtle Beckner, Agnes Chesser, June Coates, Diana G. Coles, James E. Cole, Carol Combs, Norma Dilde, Elsie D. Donahoe, Ethel Edwards, Pauline M. Emerson, Roxanne S. Hayes, Arthur Kempf, Paul M. Kerder, Jack L. Lisle, Nancy L. Lisle, Thomas W. Lovewell, Margaret Maxwell, Clarence Meade, Claud C. McClain, Thelma Noland, Maxine O'Banion, Theresa Ross, Clarence T. Wade, Wanda Jean Weiser, Mildred Woods,

3. STATE HOSPITAL NO. 3, NEVADA, MISSOURI
Billy D. Barnes, Lynwood W. Clark, Florence Carlson, Lusi Carlson, Mary T. Mixner, George S. Nicas, Richard E. Place, John E. Strack,

4. STATE HOSPITAL NO. 4, FARMINGTON, MISSOURI
Raymond Edgars, Paul Steward, Harold Umfleet, Bobby Watkins,

5. MALCOLM BLISS HOSPITAL, ST. LOUIS, MISSOURI
James A. Ballard, Hardy Ball,

B. DIVISION OF HEALTH:
ELLIS FISCHEL STATE CANCER HOSPITAL, COLUMBIA, MISSOURI
Ruth E. Harris, Betty J. Heisler, Edith J. Sims

GROUP II—EMPLOYEES OF STATE BOARD OF TRAINING SCHOOLS, CHILLICOTHE, MISSOURI
Letha O. Briscoe,

Petitioners
For Themselves and Others Similarly Situated,

vs.

DEPARTMENT OF PUBLIC HEALTH & WELFARE OF THE STATE OF MISSOURI,
AUSTIN HILL, Director, Department of Public Health & Welfare, State of Missouri,
DIVISION OF MENTAL DISEASE, State of Missouri,
GEORGE A. ULETT, Director of Division of Mental Disease, State of Missouri,
J. M. GARNER, Acting Director of Division of Health, State of Missouri,
STATE BOARD OF TRAINING SCHOOLS,
W. L. SEARS, Director, Division of Training Schools,
ERIN J. LAMB, JAMES L. COFFMAN, JOHN J. GILLIS, JAMES E. CONWAY, MRS. JUANITA EVANS, ELLIS F. RUCKER, Members of the State Board of Training Schools,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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VISION OF MENTAL DISEASE, State of Missouri,
RGE A. ULETT, Director of Division of Mental Disease, State of Missouri,
M. GARNER, Acting Director of Division of Health, State of Missouri,
ATE BOARD OF TRAINING SCHOOLS,
L. SEARS, Director, Division of Training Schools,
N J. LAMB, JAMES L. COFFMAN, JOHN J. GILLIS, JAMES E. CONWAY, MRS. JUANITA VANS, ELLIS F. RUCKER, Members of the State Board of Training Schools,
Respondents

TITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, sitting *en banc,* entered on November 11, 1971.

OPINIONS BELOW

The opinion of the *en banc* Court of Appeals is as yet unreported; it is set forth in the Appendix, *infra,* at 1a-25a. The opinion of the three judge panel of the Court of Appeals, prior to rehearing by the Court *en banc,* is unreported and is set out in the Appendix, *infra,* 26a-37a. The order of the District Court granting respondents' motion to dismiss the complaint is also unreported and is printed in the Appendix, *infra,* 39a-40a.

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit *en banc* was entered on November 11, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether Congress intended to authorize suits by employees of State-owned schools and hospitals against a State for wage claims under the Fair Labor Standards Act.

2. Whether, under *Parden* v. *Terminal Ry. Co.,* 377 U.S. 184 (1964), a State is deemed to have waived its 11th Amendment immunity to citizen-employee suits by continuing to engage in activities to which Congress has extended the coverage of the Fair Labor Standards Act under its Commerce Clause power.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Article I, Section 8, Clause 3.

United States Constitution, Amendment XI.

The pertinent provisions of the Fair Labor Standards Act, as amended, Sections 3(d), (r), (s), 16(b), (c), and 17, 29 U.S.C. § 203, *et seq.* are set forth in Appendix B.

Since the proceedings draws into question the constitutionality of Section 16(b) of the Fair Labor Standards Act as affected by the 1966 Amendments, P.L. 89-601, 80 Stat. 830, 29 U.S.C. § 216(b), an Act of Congress affecting the public interest, and neither the United States nor any agency, officer or employee thereof is a party, it is noted that 28 U.S.C. §2403 may be applicable.

No court of the United States as defined by 28 U.S.C. §451 has, pursuant to 28 U.S.C. §2403, certified to the Attorney General of the fact that the constitutionality of such Act of Congress has been drawn in question.

STATEMENT OF THE CASE

Petitioners are employees of five mental hospitals and a cancer hospital operated by the State of Missouri and employees of the State training school for girls operating under the Department of Corrections of the State of Missouri. Respondents are the Department of Public Health and Welfare and various officials having supervision over the State hospitals and training schools, who are sued in their official capacities and as individuals.

Petitioners brought this class action suit in the United States District Court for the Western District

of Missouri on August 4, 1969 to recover unpaid overtime compensation due them under § 16(b) of the Fair Labor Standards Act (FLSA), as amended, 29 U.S.C. § 216(b). They also seek an equal amount as liquidated damages, as well as attorneys' fees, as provided in the statute.

The District Court in the instant case sustained respondents' motion to dismiss the complaint upon the ground that this is a suit by citizens of a State against the State and as such is barred by the Eleventh Amendment and its principle of sovereign immunity.

A three-judge panel of the Court of Appeals, in a two to one decision, reversed the judgment of dismissal and held that Congress, by its passage of certain amendments in 1966, intended to authorize FLSA suits by citizen-employees against a State, and that the State of Missouri had waived its sovereign immunity to suit by continuing to operate its hospitals and schools after passage of the 1966 amendments extending coverage to employees of those institutions. It based its decision on *Maryland* v. *Wirtz,* 392 U.S. 183 (1968) in which this Court upheld the validity of the 1966 FLSA amendments (but reserving the right-to-sue issue) and *Parden* v. *Terminal Ry. Co.,* 377 U.S. 184 (1964) which held that Congress, under its Commerce Clause power, could validly subject States to employee suits.

In a rehearing before the Eighth Circuit Court of Appeals *en banc,* that Court, in a 5 to 4 decision, distinguished *Parden* and vacated the judgment of the three-judge panel. It thereby upheld the trial court's dismissal of the complaint by the State employees against the State of Missouri agencies.

REASONS FOR GRANTING THE WRIT

1. The Decision Below Conflicts With the Decision of the Tenth Circuit Court of Appeals as to Whether Sovereign Immunity Bars a Suit for Wage Claims Under the Fair Labor Standards Act by State Employees Against a State.

Section 16(b) of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 216(b), authorizes suits by employees against employers for the amount of their unpaid overtime compensation and an additional equal amount as liquidated damages as well as reasonable attorney's fees and costs.

The original Act excluded States from its coverage. However, amendments were adopted by Congress in 1966 which extended the Act to hospitals and schools, 29 U.S.C. §§ 203(r), (s)(4), P.L. 89-601, 80 Stat. 830, and also expanded the definition of covered employers to include States and their political subdivisions, 29 U.S.C. § 203(d).

This Court considered the effect of those amendments in *Maryland* v. *Wirtz,* 392 U.S. 183 (1968). It upheld their validity against the challenge by the State of Maryland (joined by 27 other States) that they violated the Eleventh Amendment and the doctrine of sovereign immunity and ruled that Congress could, under its Commerce Clause power, make the overtime and minimum wage provisions of the Fair Labor Standards Act applicable to employees of State schools and hospitals.

However, the Court expressly reserved for appropriate future cases the issue of whether particular remedial provisions might not be be available when a State is involved as an employer-defendant:

> ". . . (W)e decline to be drawn into an abstract discussion of the numerous complex issues that might arise in connection with the Act's various

remedial provisions. They are almost impossible and most unnecessary to resolve in advance of particular facts, stated claims, and identified plaintiffs and defendants. Questions of state immunity are therefore reserved for appropriate future cases." 392 U.S. at 200.

Two Circuits have now taken up these reserved questions—with directly contradictory results.

Here, the Eighth Circuit Court of Appeals, in a 5 to 4 decision, has held that "a state is immune from a suit brought against it by its citizens on the basis of a reasonable interpretation of the original Constitution and additionally upon the basis of the Eleventh Amendment" (App. at 5a).[1] It distinguished *Parden* v. *Terminal Ry. Co.*, 377 U.S. 184 (1964) in which this Court held that Congress under its commerce power could validly subject States to employee suits under the Federal Employees Liability Act. "We are convinced," said the Court below, "that the State has not waived its sovereign immunity or consented to be sued in an action by its hospital and training school employees for overtime compensation under § 216(b)" (App. at 12a).

The Court below was aware that its decision directly conflicted with the decision of the Tenth Circuit in *Briggs* v. *Sagers*, 424 F.2d 130 (1970), *cert. denied* 400 U.S. 829 (1971). There the Tenth Circuit, in applying the *Parden* doctrine, rejected Utah's defense of sovereign immunity to a federal court suit under FLSA by State employees. It found unpersuasive all of the factors relied upon by the majority in the Court below to distinguish *Parden* and ruled that the State had im-

[1] The Eleventh Amendment by its terms only bars suits against a State by citizens of other States, but this Court has consistently interpreted it to bar suits against a State by its own citizens since *Hans* v. *Louisiana*, 134 U.S. 1 (1890) absent the waiver issue involved herein.

pliedly waived its sovereign immunity by continuation of its operation of state institutions which had been defined by Congress as enterprises in interstate commerce and thus subject to Congressional regulation.

In addition to the decisions in these two Circuits, there is now pending in the Fifth Circuit Court of Appeals, *Williams* v. *University of Texas,* C.A. No. 71-3183 (5th Cir.), involving the exact same issues and law. There the District Court ruled in favor of the State of Texas and dismissed the complaint on the basis of sovereign immunity.

In two other cases overtime wage claim suits against State agencies under the 1966 FLSA amendments were successfully maintained, although the courts did not consider the constitutional issues involved here. *King* v. *Board of Education,* 435 F.2d 295 (7th Cir. 1970), *cert. denied* 402 U.S. 908 (1971); *Glick* v. *Montana,* 485 P.2d 42 (Mont. S. Ct. 1971).

At the present time, there is the incongruous situation of a citizen-employee of a State being able to sue for a federally created wage claim against his State only if he happens to live in a State within a favorable circuit. Congress, at the very least, certainly intended a uniform national policy on this question.

It is clear that the issues left unresolved in *Maryland* v. *Wirtz* have not been dormant and are likely to produce further litigation unless resolved by this Court. The conflicts in the circuits now justify the grant of certiorari to review the judgment below.

2. The Decision Below Raises Important Federal and Constitutional Issues of Sovereign Immunity, Agency, and Consent to Suit Specifically Left Open by This Court.

In *Maryland* v. *Wirtz, supra,* at 200, this Court noted that in the FLSA remedial provisions there were important issues "percolating . . . of interests of the

United States and problems of immunity, agency, and consent to suit." They include the following, which can only be answered by an authoritative decision of this Court:

(1) Did Congress intend to authorize suits by State employees against the States under the Fair Labor Sandards Act?

The provision in question is § 16(b) of the Act which provides that "*Any employer* who violates the pay provisions of this Act shall be liable to the employee or employees affected" in an action brought by the employees. Nothing in the Act, as amended in 1966, provides that States are to be treated any differently from any other employer under its remedial provisions.

The Court below, in its opinion, is not entirely clear whether it is holding that Congress had no power—or did not intend—to permit State employees to sue the State under the Act. Although the 1966 amendments did not say specifically that the right of employees to sue was also enforceable against a State as an employer, certainly there is a far stronger case for finding such a Congressional intent than under the Federal Employees Liability Act at issue in *Parden* v. *Terminal Ry Co., supra.* In that case, the majority held that Congress had the power *and* intent to impose FELA liability on all carriers, including State-owned ones, and denied the claim of immunity to suit although the States were not specifically mentioned in the statute. This Court had reached similar results in *United States* v. *California,* 297 U.S. 175 (1936) as to the Federal Safety Appliance Act, and in *California* v. *Taylor,* 353 U.S. 553 (1957) with regard to the Railway Labor Act.

(2) Whether a State is deemed to have waived its Eleventh Amendment immunity to citizen-employee suits by continuing to engage in activities to which

Congress has extended the coverage of the Fair Labor Standards Act under its Commerce Clause power?

This Court's decision in *Parden* v. *Terminal Ry. Co.* was recognized by both the majority and dissenters below as the leading case on this issue. There, this Court held that sovereign immunity was not a bar to a federally created right to sue the State by citizen-employees of a State-owned railroad. The rationale in *Parden* is that consent by a State to be sued would be implied as a matter of federal law from the fact of State engagement in commerce subject to Congressional regulation:

> "By empowering Congress to regulate commerce then, the states necessarily surrendered any portion of their sovereignty that would stand in the way of such regulation. . . 'The state, by engaging in interstate commerce, and thereby subjecting itself to the Act, must be held to have waived any right it may have had arising out of a general rule that a sovereign state may not be sued without its consent.'" 377 U.S. at 192, 193.

The Court below, however, demanded *actual* consent to be sued and waiver of sovereign immunity. It said that such consent or waiver would not be implied—but must be "knowingly and intelligently" waived. Indeed, it relied on *Johnson* v. *Zerbst,* 304 U.S. 458 (1938) in indulging in "every reasonable presumption against waiver," holding to the same standard of waiver of sovereign immunity as waiver of an accused's Sixth Amendment right to counsel. Cf. Dissent in *Parden* v. *Terminal Ry. Co.,* 377 U.S. at 198.

The Eighth Circuit below distinguished *Parden* in four respects: (1) the availability of "other remedies," such as suits by the Secretary of Labor under § 16(c) for back pay and § 17 injunction proceedings; (2) the provision for liquidated double damages and

attorney's fees under § 16(b); (3) the nature of the activities regulated, *i.e.*, whether "governmental" or "proprietary"; and (4) the fact that the State's operation of the hospitals and the school pre-dated the passage of the 1966 amendments extending the Act's coverage.

In contrast, the Tenth Circuit in *Briggs* v. *Sager, supra,* rejected these asserted distinctions. Thus, the four distinctions are really four unresolved questions.

Although the FLSA also provides remedies for violation of the Act through suits by the Secretary of Labor under §§ 16(c) and 17, there was no discussion by the majority in the Court below on the adequacy of these alternatives. It should be noted, for example, that the Secretary of Labor did not file suit in this case until January 27, 1971—almost a year and a half after the petitioners filed suit on August 7, 1969.

The Secretary of Labor by invitation of the Court below filed an *amicus* brief. He pointed out that the sheer number of establishments (almost two million) under the Act permitted the Department to investigate less than four per cent each year. Also the §16(b) suits by employees assures them of an opportunity of having their claims presented to a court. Actions under §§ 16(c) and 17 are within the discretion of the Secretary of Labor "who represents interests which may be distinct from the personal interests of the individual employee" (*Amicus Curiae Brief,* Secretary of Labor, at 17). Also a proviso bars the Secretary from suing in "any case involving an issue of law which has not been settled finally by the courts." See *Hodgson* v. *Ewing,* — F.2d — (Fifth Cir.) No. 71-1733, Nov. 24, 1971. This "novel question" proviso has contributed to making "the § 16(c) remedy . . . for all practical purposes

a dead letter." *Hodgson* v. *Wheaton Glass Co.*, 446 F.2d 527, 532 (3rd Cir. 1971).

The dissent below saw no reason to reach the issue of liquidated damages and attorney's fees under FLSA, since the District Court dismissed the action in its entirety. However, it did note the provisions of the FLSA grant discretion to the District Court to deny liquidated damages if the employer shows "good faith" or "reasonable grounds" to believe his omission was not a violation of the FLSA. See Portal-to-Portal Act of 1947, § 11, 29 U.S.C. § 260, 61 Stat. 89. In any case, it is unclear what relevance the issue of liquidated damages has to the doctrine of sovereign immunity. The issue is one of the right to sue a State—not how much can be collected.

The Court below held that the *Parden* doctrine of implied waiver of sovereign immunity should not apply when the function involved is a "governmental" rather than a "proprietary" one. However, it failed even to acknowledge the statement by this Court in *Maryland* v. *Wirtz* that the federal government when acting within a delegated power "may override countervailing State interests whether these be described as 'governmental' or 'proprietary' in character." 392 U.S. at 195.

Great emphasis was placed by the Court below on the fact that the State had operated schools and hospitals long before the 1966 Amendments and, therefore, had no occasion to choose between staying out of the field or entering it subject to the conditions imposed under the commerce power. However, nothing appears in the legislative history of the Act to suggest that Congress intended to establish procedural rights only for employees of State institutions founded after 1966. See S. Rept. No. 1487, 89th Cong. 2d Sess; H. Rept. No. 1366, 89th Cong. 2d Sess.

In *Briggs*, the Tenth Circuit held that the State, by continuing to run hospitals and schools after passage of the 1966 Amendments, thereby accepted the Congressional conditions attached under the FLSA. It said:

> "When Congress constitutionally hinges the right of a State to engage in interstate commerce upon its amenability to a federal court suit by private parties, the States must decide *eo instante* whether to continue or withdraw." [424 F.2d at 134]

It would, indeed, be anomalous if the Act only applied to hospitals and schools opened by a State after 1966 and not those in existence before. However, that would be the effect of this distinction drawn by the Court below.

3. The Issues Presented in This Case Are of Great National Importance Affecting Millions of People.

The Secretary of Labor has reported that the 1966 Amendments have added 2.7 million employees and 119,000 establishments in the sector of local government employment to FLSA coverage.[2]

In a survey conducted by the Department of Labor in 1969, it was determined that 619,000 employees, nearly three out of ten hospital employees brought under the coverage of the FLSA, worked in hospitals operated by State and local governments.[3]

Almost one-fourth of the 1,791,000 non-supervisory employees in the country's educational institutions

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[2] The Secretary of Labor's Report to the 92nd Congress under Section 4(d) FLSA 1971, Tables 29 and 35.

[3] U.S. Department of Labor, Wage and Labor Standards Administration, Economic Effects Studies: *Hospitals*—Submitted to the Congress—1970, pp. 10-11.

covered by the Act obtained higher minimum wages in February 1970, due to the effect of FLSA's 1966 Amendments. Regionally, the highest impact was in the South where, in March 1969, 42% of the workers were paid less than $1.45 an hour.[4]

These statistics alone indicate the importance of the issues in this case to millions of Americans, *Patterson* v. *Lamb,* 329 U.S. 539 (1947), particularly those who are in the lowest economic levels—in addition to the undeniable importance of the Constitutional questions. It is clear that much of the protection of the FLSA will be lost to those who need it the most if they are given coverage of the Act but are denied the forum in which to enforce it.

4. The Court Below Has Asserted a Balancing Test for Conflicting Constitutional Claims Directly Contrary To Applicable Decisions of This Court.

This Court in *Maryland* v. *Wirtz* has already ruled on the pre-eminence of the Federal Government's power under the Commerce Clause over the asserted right of State sovereign immunity. It said explicitly "... (I)t is clear that the Federal government when acting within a delegated power, may override countervailing state interests whether these be described as 'governmental' or 'proprietary' in character" (392 U.S. at 195). In short, it said that the argument that a Congressional Act, passed under the aegis of the commerce power, must yield to state sovereignty in the performance of governmental functions "simply is not tenable" (*ibid*).

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[4] U.S. Department of Labor, Wage and Labor Standards Administration, Economic Effects Studies: *Educational Institutions*—Submitted to the Congress—1970, pp. 2, 8.

In spite of that, the Court below nevertheless concluded:

> "If any balancing of rights under the Commerce Clause against the right of the State's sovereign immunity is required, the well recognized constitutional guarantee of sovereign immunity should prevail." App. at 9a.

In *Wirtz*, this Court pointed out (392 U.S. at 195) that "the contention that state concerns might constitutionally 'outweigh' the importance of an otherwise valid federal statute regulating commerce" had been "put to rest" as long ago as *Sanitary District* v. *United States*, 266 U.S. 405 (1924). See also *Oklahoma* v. *Atkinson Co.*, 313 U.S. 508 (1941).

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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